ground of misconduct, it may with some degree of plausibility be asserted that the grant of alimony *pendente lite* and counsel fees is based upon the obligation to support.[14] As, however, under the New York law she would be entitled to support even though she had independent means, but not to the alimony and counsel fees in question unless without adequate means, it is believed that here also the true basis is the protection of defendants who may, provided they obtain a fair hearing, be able to establish the validity of the marriage.

If now, after the supposed husband's death, the action is brought by relatives having an interest to do so, ought the result to be different? It would seem not, if the views above set forth as to the real reason for granting the allowance in question during the husband's lifetime are sound. Apparently the majority of the court would allow both alimony and counsel fees even after the husband's death, if they were to be paid out of his estate, on the theory that the "obligation to support" is replaced by the "interest [which the wife would have if the marriage were valid] in the husband's estate". In the principal case, however, the fund out of which payment was sought was not a part of the husband's estate, but was vested in a trustee for the benefit, if the marriage were annulled, of the plaintiffs, if it were held valid, for the defendant's infant son. The defendant herself could claim no part of it; she was, however, interested in maintaining her standing as a wife, and if left without means to employ counsel might not be able to do so. The real question, it is submitted, is, whether the same policy which underlies the grants where the husband is alive does not demand, as the minority of the court assert, the payment of counsel fees in such a case, although not of alimony? The bringing of the action by the plaintiffs compels the defendant to defend her status as a wife, but does not throw upon her any additional burden in the way of support.[15] In view of the hardship and possibility of an erroneous result to which the action exposes the defendant who has not the means to employ competent counsel, it is respectfully submitted that the view of the dissenting judges is to be preferred to that of the majority and that reasonable counsel fees should in such cases be awarded.

THE EFFECT OF RESTRICTIVE COVENANTS ON MARKETABLE TITLES.—While a vendor may specifically enforce a contract for the sale of land to recover the purchase price; in order to do so he must offer the

[14]In spite of the fact that the New York statutes providing for alimony *pendente lite* and counsel fees fail to provide for them in annulment actions, they are "on general equitable principles" allowed in an action for the annulment of a voidable marriage where the wife is defendant and without means for defense, Erlanger *v.* Erlanger (1916) 173 App. Div. 767, 159 N. Y. Supp. 353; Oppenheimer *v.* Oppenheimer (1912) 153 App. Div. 636, 138 N. Y. Supp. 643; *cf.* Brand *v.* Brand (1917) 178 App. Div. 822, 166 N. Y. Supp. 90, but are denied when she is plaintiff. Jones *v.* Brinsmade, *supra,* footnote 13. The "general equitable grounds" can only be the protection of the supposed wife who is defending her matrimonial status.

[15]That alimony *pendente lite* ought not to be granted in such a case seems clear. After the death of the husband without property she has absolutely no basis for any claim to support, be the marriage valid or invalid: but so long as he lives, she may, if she successfully defends, establish her claim to support and so may fairly, for the reasons suggested, be granted alimony *pendente lite.*

vendee a "marketable" title, one not subject to any defect,[1] incumbrance[2] or restriction.[3] This requirement does not necessarily depend upon the purchaser's having stipulated in the contract for a title "free of incumbrances". Such a condition in the agreement is implied unless it appears distinctly to the contrary, and unless fulfilled the purchaser is relieved from his bargain.[4] But all defects in the title do not constitute defences to an action for specific performance. It is frequently said that a title that is reasonably free from doubt cannot be objected to by the vendee.[5] A mere possibility of an adverse claim is not a defect.[6] The general test applied is not whether the purchaser will ever be incommoded by the restriction on the land,[7] but whether the title offered is marketable.[8] Inasmuch as a marketable title is defined as one which can be forced on an unwilling purchaser,[9] this test must be further expanded to be of any use. An outstanding mortgage or lien where the court can decree the discharge of the incumbrance out of the purchase money, is held to be no bar to the vendor's suit.[10] And it would seem that where the adverse claimant to a title is before the court his claim could be definitely settled so as to render the title no

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[1]Townshend *v.* Goodfellow (1889) 40 Minn. 312, 41 N. W. 1056; Zane *v.* Weintz (1903) 65 N. J. Eq. 214, 55 Atl. 641; Martin *v.* Hamlin (1900) 176 Mass. 180, 57 N. E. 381.

[2]Giles *v.* Union Land Co. (Tex. 1917) 196 S. W. 312.

[3]Wetmore *v.* Bruce (1890) 118 N. Y. 319, 23 N. E. 303; Remsen *v.* Wingert (1906) 112 App. Div. 234, 98 N. Y. Supp. 388 (easement); Raynor *v.* Lyon (N. Y. 1887) 46 Hun. 227.

[4]Bowen *v.* Vickers (1839) 2 N. J. Eq. 520; see Moore *v.* Williams (1889) 115 N. Y. 586, 592, 22 N. E. 233. "But, aside from the language used in the contract it is familiar law that an agreement to make a good title is always implied in executory contracts for the sale of land, and that a purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title, knowing its defects."

[5]Conley *v.* Finn (1898) 171 Mass. 70, 72, 50 N. E. 460. "'When questions as to the validity of a title are settled beyond a reasonable doubt, although there may be still the possibility of a defect, such mere possibility will not exempt one from his liability to complete the purchase he has made.'"

[6]Bardes *v.* Herman (1911) 144 App. Div. 772, 129 N. Y. Supp. 723; Post *v.* Bernheimer (1883) 31 Hun. 247.

[7]Brooklyn Park Comm. *v.* Armstrong (1871) 45 N. Y. 234, 248. "When it is ascertained that there is an existing defect in the title, the purchaser will not be compelled to perform on the allegation that it is doubtful whether the defect will ever incommode him."

[8]Dyker Meadow *etc.* Co. *v.* Cook (1899) 159 N. Y. 6, 15, 53 N. E. 690. "To entitle a vendor to specific performance, of a contract for the purchase and sale of real estate, he must be able to tender a marketable title."

[9]Pryke *v.* Waddingham (1852) 10 Hare *1, 8. ". . . that the rule rests upon this, that every purchaser is entitled to require a marketable title, by which I understand to be meant a title which, so far as its antecedents are concerned, may at all times and under all circumstances, be forced upon an unwilling purchaser."

[10]Guild *v.* Atchison, T. & S. F. R. R. (1896) 57 Kan. 70, 45 Pac. 82; Blanton *v.* Kentucky Distilleries *etc.* Co. (C. C. 1902) 120 Fed. 318, 340, *aff'd.* (C. C. A. 1906) 149 Fed. 31; Frain *v.* Klein (1897) 18 App. Div. 64, 45 N. Y. Supp. 394 (assessment lien).

longer uncertain.[11] The more difficult question arises where the court cannot remove the alleged defect, and must decide whether the adverse claim, incumbrance or restriction is substantial enough to render the title unmarketable. A title may be doubtful where the defect is based (1) on an uncertain question of law, or (2) on the existence of certain unknown facts, especially where these facts can be proved only by parol or equally uncertain evidence.[12] Where there was a doubtful question of law involved, the early English practice was for the court to decide for or against the validity of the title, and to rule accordingly on the vendor's suit, although such a decision would not be *res judicata,* if the titulary defect were contested.[13] This is not the rule today either in England[14] or this country.[15] It is commonly said that a purchaser will not be compelled to buy a lawsuit.[16] So where the law is doubtful the court will not compel the vendee to complete his contract, as the court's opinion of the law might not be binding in a later suit. But if the specific defect in the title the vendor offers, has been definitely settled by precedents, so that no other court could reasonably decide in favor of the outstanding claim, the title is held to be marketable.[17]

In a recent suit by a vendor to specifically enforce a contract for conveyance of land on Fifth Avenue near Thirty-ninth Street, *Bull* v. *Burton* (1919) 227 N. Y. 101, 124 N. E. 111, it was held by a majority of the court that restrictive covenants, imposed on the land by a predecessor in title, against the erection on the land of any slaughter house, smith shop, forge, *etc.,* or other noxious business, or the keeping of any stable thereon, were restrictions such as to render the title defective and unmarketable. While outworn restrictions on residential property, where the character of the neighborhood has changed into a business district, so as to render the restrictions of little benefit to the adjacent dominant estates and of considerable hardship to the owner

[11]Chesman *v.* Cummings (1886) 142 Mass. 65, 7 N. E. 13.

[12]Fahy *v.* Cavanagh (1899) 59 N. J. Eq. 278, 44 Atl. 154.

[13]See note in Shapland *v.* Smith (1780) 1 Brown C. C. *75, 76.

[14]Palmer *v.* Locke (1881) 18 Ch. D. 381, 388; Pyrke *v.* Waddingham, *supra,* footnote 9; Stapylton *v.* Scott (1809) 16 Ves. *272.

[15]Zane *v.* Weintz, *supra,* footnote 1; Richards *v.* Knight (1902) 64 N. J. Eq. 196, 53 Atl. 452; Dyker Meadow *etc.* Co. *v.* Cook, *supra,* footnote 8.

[16]Boylan *v.* Wilson (Ala. 1918) 79 So. 364, 366. "One who has contracted for a 'good title', will not be required to take anything but a 'good title', and the court will not compel him to buy a lawsuit."

[17]Reformed Protestant Dutch Church *v.* Madison Ave. Bldg. Co. (1915) 214 N. Y. 268, 108 N. E. 444. In this case a contract for the conveyance of property on Madison Avenue was specifically enforced. The property was subject to a general restriction that no buildings should be erected on the block other than dwelling houses of at least two stories in height. The proposed purchaser desired the premises as a site for a large apartment house, and the contract provided that it should not be enforceable, if the admitted restrictions would prevent the erection of such a building. It was held that according to the law of New York, the term dwelling house was broad enough to include and permit an apartment house, and that any suit brought to interfere with the purchaser's use of the property for an apartment house would be determined by the rule of *stare decisis* and the restriction therefore would not prevent the vendor from enforcing specific performance of the contract in question.

of such property, may not be enforceable,[18] in this case the covenants were something more than mere restrictions to preserve a residential section. Presumably a first class business house on Fifth Avenue might yet object to the erection of a stable next door. At least the question of their enforceability would seem to be sufficiently doubtful to prevent such a title being marketable.

The dissenting opinion considered it absurd that these restrictions should be considered incumbrances, that land worth $19,700 a front foot should ever be used for a slaughter house, smith shop, *etc.*, and that such a title was completely marketable. And this brings up the question whether the rule of marketability should be extended to cases where the incumbrance is a restriction which is unlikely ever to be a burden on the owner's actual use of the property. It is true that where a defect in a title rests on a mere possibility of an outside claim existing or on the remote contingency of a future event, the title is not unmarketable.[19] But if a reasonable doubt as to such a defect exists, the purchaser will not be compelled to receive the land.[20] In *Bull* v. *Burton, supra,* the defect asserted by the vendee was in effect, that if the contingency arose that the owner of the land wished to maintain a slaughter house, smith shop, *etc.*, his rights of ownership would be restricted. If, despite the great value of the property, the owner should actually wish to carry on such business the court would have had to find the title unmarketable. It might find conceivably that the purchaser, despite his assertions to the contrary, could not possibly desire then, nor at any future time, to erect such buildings.[21] But this would be extending the remote contingency doctrine beyond its present application and would not seem to be warranted by the facts in this case.[22]

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[18]Trustees of Columbia College *v.* Thacher (1882) 87 N. Y. 311; 14 Columbia Law Rev. 438.

[19]Rife *v.* Lybarger (1892) 49 Oh. St. 422, 31 N. E. 768; Camberling *v.* Purton (1891) 125 N. Y. 610, 26 N. E. 907; Bardes *v.* Herman, *supra,* footnote 6; Post *v.* Bernheimer, *supra,* footnote 6. But this contingency must be very remote.

[20]Hess *v.* Bowen (C. C. A. 1917) 241 Fed. 659; Doutney *v.* Lambie (1911) 78 N. J. Eq. 277, 78 Atl. 746; Remsen *v.* Wingert, *supra,* footnote 3; Baker *v.* Baker (1918) 284 Ill. 537, 120 N. E. 525 (*Semble*); Dole *v.* Shaw (1918) 282 Ill. 642, 118 N. E. 1044.

[21]In some classes of cases, notably party wall agreements, restrictions on land which are offset by reciprocal benefits are held by the courts to be well recognized benefits to the land rather than burdens, and hence not incumbrances on the title, Hendricks *v.* Stark (1867) 37 N. Y. 106, the court in such cases apparently believing that the likelihood of anyone objecting to such arrangements is too remote a possibility to render the land unmarketable. In Riggs *v.* Parsell (1876) 66 N. Y. 193, this doctrine was applied to property on a block where there was a general restriction requiring that a courtyard be left in front of each house. The case was later reversed when it was alleged that the restrictions did depreciate the market value of the land. Riggs *v.* Pursell (1878) 74 N. Y. 370. The purchase was made at a judicial foreclosure sale and the original case was later distinguished on that ground. See Wetmore *v.* Bruce, *supra,* footnote 3, at p. 323; Scudder *v.* Watt (1904) 98 App. Div. 228, 231, 90 N. Y. Supp. 605. It is difficult, however, to see any distinction as regards this point between a private and a judicial sale. It is surprising that the court should render its own proceedings of greater hazard to the purchaser than a private sale.

[22]*Cf.* Dethoff *v.* Voit (1916) 172 App. Div. 201, 158 N. Y. Supp. 522.